THE ADVISABILITY OF A PUBLIC DEFENDER

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The insufficiency of our modern judicial system to meet the demands for justice can hardly be questioned by the well informed. This situation is being remedied by many methods, an example of which is the enactment of workmen's compensation acts to displace judicial procedure based upon the law of negligence. Nevertheless, the substance of our present method of determining disputed matters involved in so-called crimes, torts and other justiciable wrongs, will doubtless remain for a long time to come. No matter what our theories may be, we have the spectacle in all ordinary criminal trials of a more or less unequal combat between society on the one hand and the individual or banded individuals on the other. If the defendant is innocent he is able ordinarily to establish the fact only at a frightful cost. If the defendant is poor and friendless, the chances of his escape, even though innocent, are small and, if guilty, the chances are great that his punishment will be excessive. Under our system of jurisprudence, almost every criminal proceeding is attended by an injustice, the toleration of which is inexplicable. We say that the presumption of innocence attends the defendant in a criminal trial at least until the case passes from the hands of the advocates, yet bringing to bear upon the accused all the power of organized society to convict even before trial, we compel the accused, if possible, to provide his own defense at his own full cost and risk, and we turn the tribunal, which should be dispassionately seeking only the truth, into a battlefield for the mighty or a slaughterhouse for the weak. At least in all criminal proceedings the accused should be given by the state what the husband is compelled to furnish the wife accused of infidelity, adequate means of defense.

That defense will not be adequate unless afforded by an official secure from fear or favor. The administration of injustice by the private detective should cease. From the moment a man is arrested the state should, without request, afford him official counsel equal to and coördinate in every respect with that of the prosecution, for

in the eye of the law he is only under suspicion while presumed to be innocent, and at best at a fearful disadvantage. Certainly he should not be subjected to inquisition except in the presence of such official counsel.

The refusal of the state to provide for the poor and helpless as adequate counsel and advocacy as it provides for pressing its own charge is a burning shame for which it is difficult to find adequate expression. The state compels the weak to submit even in advance to the fear and terror of the powerful in their control over judicial proceedings. The state entangles the hands of every citizen in the mesh of the law, yet leaves him helpless if poor to either maintain or defend an action in court. The state refuses to make justice free to the multitude and practically shuts the door of justice in their faces, leaving them to a wolfishness of greed and heartlessness that it is difficult to believe exists, but which does exist and will continue to exist until there is a radical change in human nature itself. In the face of such a condition of affairs, the few that are rich and even the many that are comfortable fatuously wonder at the spirit of anarchy that flames forth ever and anon and which it is increasingly difficult to restrain.

The president of the Legal Aid Society of New York, speaking of thirty-six years' work, said: "In the City of New York alone we have by this time, taught over 380,000 lessons to that number of taskmasters," yet even he bewailed the inadequacy of such relief. Great as the work of the New York society has been, its greatest significance is the revelation of the appalling need for "justice" against "taskmastership," a need which it is evident the greatest of these legal aid societies can hardly more than make temporary shift to meet until the people at large, if not a sleeping and self-satisfied bar, awake. Members of the legal profession sometimes take much pride in the fact that courts appoint counsel for poor persons charged with crime, and that the poverty stricken who will make oath to their pitiful state may even sue *in forma pauperis*. The utter futility of such methods has given rise to legal aid societies, and one of the greatest advocates in the city of New York, confessing his own prior ignorance of the actual extent of such work there done, testified before the delegates of legal aid societies of the United States as to the "immense good to mankind, the immense good to this community, not only to the poor, but to the rich and substantial" done by the New York society.

In the *Bulletin* of the Chicago Legal Aid Society, published in the issue of October, 1912, of the *Illinois Law Review*, appears this comment: "We may hope that in time a direct appeal to a public official shall start the machinery of justice in motion, providing automatically for redress and defense without the present preliminary requirement of payment for professional services most needed by those least able to afford them. In the meantime it is the high privilege of legal aid societies to assist the unfortunate over the wall of procedure into the court of justice." What an indictment of our boasted civilization and especially of governmental agency in its most sacred function and office, that of doing "justice."

The English authorities hold that their poor prisoner's defense act of 1903 was not intended to "give a person legal assistance in order to find out if he had got a defense," or, in other words, have practically branded the act as saying he shall not have such help before and at the trial unless he has previously shown without any such help that he has a defense. Comment seems superfluous as to the dead-sea character of such fruit of statutory and judicial beneficence.

An inquiry lately came to the writer from the chairman of a committee of a Chicago bar association, asking for information "on the question of a public defender in general or in its application to a large city like Chicago." The inquiry was passed on to Hon. Wiley F. Crist, judge of department one of the police court of San Francisco, who has had experience in legal aid society work, and to Professor Elmer I. Miller, vice president and supervisor of history and political science at the California State Normal School at Chico.

Judge Crist replied as follows:

"I want heartily to concur with you that a public defender is desirable. My experience leads me to believe that a great many defendants in criminal actions could prove their innocence if they had capable counsel, but many cannot afford to pay the essential fees. In addition to this I believe there would be a great saving of expense to the taxpayer caused by trials in the superior court of persons unjustly charged with crime."

Professor Miller stated some of his reasons for believing in a public defender, as follows:

"1. No doubt poor defendants are often unfairly treated because their cases are not properly presented.

"2. The additional cost of a public defender will probably be more than offset by the saving in keeping innocent persons out of jail.

"3. Inequality before the law, due to the inequality of financial ability of persons to hire counsel, is notoriously great.

"4. The present system looks too much to victory to the powerful and too little to justice for the poor.

"5. This last situation must change or the rapidly declining influence of the courts with the masses of the people will soon reach a very dangerous point."

As to the need for a public defender under our present as well as the coming system of jurisprudence in criminal matters, careful study may well be given the article on "Public Defense in Criminal Trials," by Maurice Parmelee, Professor of Sociology, University of Missouri, published in vol. 1 of the *Journal of Criminal Law and Criminology*, and also Professor Parmelee's work on *The Principles of Anthropology and Sociology in their Relations to Criminal Procedure.* The paper by Robert Ferrari, of the New York City Bar, on "The Public Defender: The Complement of the District Attorney," published in vol. 2, p. 704, et seq., of that journal, also deals with the subject in an illuminating manner. At the present time, the provisions for defending poor persons accused of crime are totally inadequate. Probably few, if any, of the 380,000 lessons taught to "taskmasters" by the New York City Legal Aid Society, involved the defense in a criminal case. Perhaps the only statute showing anything like a recognition of the breadth of the duty which society owes its needy members is the freeholders' charter of the county of Los Angeles, California, which affords relief in civil, to some extent at least, as well as in criminal matters, under civil service system with an efficiency bureau and a well guarded recall. A full review of the charter provisions concerned may be found in the opening portion of a symposium on that and related matters prepared, at the suggestion of Dr. John H. Wigmore, by the writer and attorney Abram E. Adelman of the Chicago bar, for publication in the January, 1914, issue of the *Journal of Criminal Law and Criminology.*